

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

x

BLUESTONE COAL CORPORATION, :
a West Virginia Corporation; and :
DOUBLE-BONUS MINING COMPANY, :
a West Virginia Corporation, :
Plaintiffs, :
:
-vs- : CIVIL ACTION
: NO. 2:16-cv-06098

PINNACLE MINING COMPANY, LLC., :
a Delaware Corporation; and TARGET :
DRILLING, INC., a Pennsylvania :
Corporation; SENECA COAL RESOURCES, :
LLC, a Delaware Limited Liability :
Company; SENECA NORTH AMERICAN COAL, :
LLC, (SNAC), a Delaware Limited :
Liability Company; CLIFFS NATURAL :
RESOURCES, INC., an Ohio Corporation; :
TAM INTERNATIONAL, INC., a Delaware :
Corporation; and C&J Well Services, :
Inc., a foreign corporation licensed :
to do business in West Virginia under :
the trade name of C&J Energy Services :
Defendants. :

x

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DWANE L. TINSLEY,
UNITED STATES MAGISTRATE JUDGE
AUGUST 14, 2018

APPEARANCES:

For the Plaintiffs:

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22 Proceedings recorded by mechanical stenography,
23 transcript produced by computer.

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1 PROCEEDINGS had before The Honorable Dwane L.
2 Tinsley, United States Magistrate Judge, United States
3 District Court for the Southern District of West Virginia,
4 at Charleston, on August 14, 2018, as follows:

5 THE CLERK: All rise. This Honorable Court is now
6 in session. Please be seated and come to order.

7 THE COURT: Good afternoon.

8 GROUP RESPONSE: Good afternoon, Your Honor.

9 THE COURT: We're here this afternoon in the
10 matter of *Bluestone Coal Corporation and Double-Bonus Mining*
11 *Company versus Pinnacle Mining Company, Target Drilling,*
12 *Seneca Coal Resources, Seneca North American Coal, Cliffs*
13 *Natural Resources, TAM, T-A-M, TAM International, and*
14 *C&J Well Services*, Civil Action Number 2:16-cv-06098.

15 Would counsel please note their appearances for the
16 record, please.

17 MR. LONG: Your Honor, Scott Long for plaintiffs.

18 MR. NELSON: Your Honor, David Nelson for
19 plaintiffs.

20 THE COURT: And for the defendants.

21 MR. BERMAN: Good afternoon , Judge. Josh Berman
22 of White & Case, for defendants Pinnacle and Seneca.

23 MR. GORSICH: Your Honor, Ron Gorsich with
24 White & Case for Defendants Pinnacle and Seneca.

25 MR. MEADOWS: Good afternoon, Your Honor. John

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1 Meadows with Steptoe & Johnson on behalf the defendants,
2 Pinnacle and Seneca.

3 THE COURT: All right. Thank you, gentlemen. I
4 hope I can remember your names, but, if not, you all just
5 correct me.

6 MR. BERMAN: Your Honor, we have one more
7 appearance. I'm sorry.

8 MR. LASOTA: Doug LaSota on behalf of Pinnacle and
9 Seneca, as well, Your Honor.

10 THE COURT: What is your name, sir?

11 MR. LASOTA: Doug LaSota, L-A-S-O-T-A.

12 THE COURT: All right, got it. Like I said, I
13 will try to remember your names, but if I don't, please let
14 me know.

15 Before we get started, I just wanted to make sure the
16 parties know, in particular, the attorneys from out of
17 state, that I used to be employed with the law firm of
18 Hendrickson & Long. And I was employed there from 2001 to
19 2013, when I became United States Magistrate Judge.

20 When I came to the bench, I had Hendrickson & Long on
21 my recusal list. And they were on my recusal list for maybe
22 two, maybe three years, at the most.

23 And so for this reason, I wanted to make sure all the
24 parties knew of my former affiliation with Hendrickson &
25 Long, and to find out whether any attorneys for both sides,

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1 in particular, the defendants, especially for the attorneys
2 out of state, if they have any concerns or problems with
3 this Court, with me sitting in this matter.

4 MR. BERMAN: No, sir, no problems at all.

5 THE COURT: And is that from all of the
6 defendants?

7 MR. BERMAN: That's on behalf of all of the
8 defendants.

9 THE COURT: All right. And I will take it that
10 the defendants will waive --

11 MR. BERMAN: Oh, I'm sorry. On behalf of my two
12 clients, Your Honor, Pinnacle and Seneca. Sorry to
13 interrupt you. There are representatives of the other
14 defendants in the room, and I will let them speak for
15 themselves.

16 THE COURT: All right. I'd like to hear from
17 them, because I need for the attorneys to state on the
18 record that they waive any concerns or objections for me
19 sitting in this case. And I want to make sure the attorneys
20 are aware that my only involvement is probably going to be
21 just on the discovery matters. The remainder of this case
22 is going to be handled by Judge Johnston, who is the Chief
23 District Court Judge, who is in charge of this case.

24 MR. ROSE: Your Honor, Dennis Rose for Cleveland
25 Cliffs, and we have no objection to you hearing this matter.

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1 THE COURT: All right. Anyone else?

2 MS. JOHNSON: Diana Johnson from Bowles Rice for
3 TAM International, and no objection.

4 MR. MACCORKLE: John MacCorkle for Ken & Coy, and
5 I have no objections, Your Honor.

6 THE COURT: Anyone else?

7 (No response.)

8 THE COURT: So I'm assuming that covers all the
9 defendants: Pinnacle Mining.

10 MR. BERMAN: Yes, sir.

11 THE COURT: Target Drilling.

12 MR. LONG: They're dismissed.

13 THE COURT: They're dismissed, that's right.

14 Seneca Coal Resources.

15 MR. BERMAN: Yes, sir.

16 THE COURT: North American Coal Company.

17 MR. BERMAN: Yes.

18 MR. GORSICH: Yes.

19 THE COURT: Cliffs Natural Resources.

20 MR. ROSE: Yes.

21 THE COURT: TAM International.

22 MS. JOHNSON: Yes.

23 THE COURT: And C&J Well Services.

24 MR. LONG: They've been dismissed, too.

25 MR. NELSON: They're dismissed.

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1 THE COURT: Okay. And based on the
2 representations, everyone waives any concerns or objections
3 to this Court handling this matter?

4 MR. BERMAN: Yes, Your Honor.

5 THE COURT: All right. Thank you, gentlemen, and
6 lady.

7 We're here today to address defendant Pinnacle Mining
8 Company's Motion to Compel, ECF No. 117.

9 The plaintiffs have responded to this motion, ECF
10 No. 127, and the defendant Pinnacle Mining filed a reply,
11 ECF 129.

12 On July 23rd, 2018, the plaintiffs filed a motion for
13 leave to file supplemental exhibit and response to the
14 Motion to Compel, ECF No. 190.

15 And on August 3rd, 2018, the defendants Seneca Coal and
16 Seneca North American filed a response.

17 On August 3rd, 2018, defendant Pinnacle Mining Company
18 and Seneca Coal Resources and Seneca North American Coal
19 filed a combined response to plaintiffs' motion and filed a
20 motion for leave to file supplemental exhibits to its Motion
21 to Compel. And that was to compel an inspection. And
22 that's ECF No. 205.

23 And the Court would note that with the motion, the
24 defendant attached an inspection plan.

25 On August 10, 2018, plaintiffs -- plaintiffs filed a

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1 response to Seneca and Pinnacle's motion for leave to file a
2 supplemental exhibit to Pinnacle Mining Company's Motion to
3 Compel an inspection.

4 And then the plaintiffs filed a motion for leave to
5 file a supplemental exhibit.

6 And Pinnacle Mining Company also filed a motion for
7 leave to file a supplemental exhibit to Motion to Compel
8 Inspection, which is ECF No. 205.

9 And the Court is going to grant both of those motions
10 to file supplemental exhibits, because the Court has
11 reviewed those exhibits for purposes of this hearing today.

12 Now, I understand that some of the parties wanted to
13 present testimony today and have witnesses here to testify.

14 MR. BERMAN: If necessary, and if it's helpful to
15 Your Honor.

16 THE COURT: Well, I was just going to say that the
17 Court does not think testimony is needed as of today.
18 However, we can revisit that at a later date if necessary.

19 Because my concern here today is that we're not trying
20 this case today. This case only deals with the Motion to
21 Compel, and I know both sides have experts that they want to
22 provide testimony, but from my review of the pleadings, I
23 think counsel have done a good job in explaining their
24 respective positions.

25 So, at this time, I don't want to hear any testimony,

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1 but we can revisit that. Because my main focus here today,
2 which appears to be the Motion to Compel the Inspection of
3 the Mine. And if I'm mistaken, please tell me if I'm
4 mistaken, but based on my review of the pleadings, I believe
5 we're here just on the Motion to Compel.

6 Is that correct?

7 MR. BERMAN: Yes, sir.

8 MR. LONG: Yes, Your Honor.

9 THE COURT: Now, it appears in reviewing the
10 pleadings that not until August 3rd, 2018, was there any
11 proposal for an inspection plan. And I think the defendants
12 have now presented an inspection plan.

13 Is that correct, Mr. Long, or, Mr. Nelson?

14 MR. LONG: Your Honor, we would agree that they
15 submitted an unverified, unsigned, unsealed proposal.

16 THE COURT: Okay.

17 Now, to the defendants' counsel, I have a question:
18 What took so long to present some type of inspection plan,
19 because that seems to have been the holdup, and it's my
20 understanding that this case has been dragging on for nearly
21 two years. I think I looked at an order that Judge Johnston
22 just entered a few days ago, where he extended all the
23 deadlines for 60 days, but he refused to extend it beyond
24 that.

25 MR. BERMAN: Correct, sir. Subject to Your

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1 Honor's ruling relative to the Motion to Compel, which,
2 during the telephonic hearing, Judge Johnston indicated that
3 he understood if the Motion to Compel is granted, that would
4 necessarily have an effect on the scheduling order, but --

5 THE COURT: In addition to -- beyond the 60 days?

6 MR. BERMAN: Beyond the 60 days.

7 THE COURT: All right.

8 MR. BERMAN: But -- and so, in fact, if it's
9 helpful for Your Honor to know, one of the things I
10 suggested to Judge Johnston is that he may want to focus, in
11 addition to the motion to extend the trial schedule, also to
12 focus and take up the present Motion to Compel, because they
13 go so much hand-in-glove.

14 And he said, no, that's -- I'm not going to do that.
15 I'm going to leave the Motion to Compel to Judge Tinsley,
16 and if that affects my scheduling order, then we'll address
17 whatever the effect is at that time.

18 But, Your Honor, if I may? You asked a poignant
19 question, and I'm very glad to have the opportunity to
20 answer you.

21 THE COURT: All right.

22 MR. BERMAN: The case, the caption --

23 THE COURT: Could you state your name for the
24 record, for the court reporter and for the Court.

25 MR. BERMAN: Yes, sir. My name is Josh Berman.

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1 And I'm here on behalf of Pinnacle and Seneca.

2 THE COURT: All right, Mr. Berman, thank you.

3 MR. BERMAN: The index number, Judge, shows that
4 the case is two years old. But that alone creates a bit of
5 a misleading impression of what's gone on for two years.

6 The fact is that in July of 2016, the case was filed.
7 And in March of 2017, the plaintiffs filed an amended
8 complaint, which, to a meaningful extent, changed the
9 complexion of the litigation, added additional parties and
10 so forth.

11 And it wasn't until the very end of the year, in 2017,
12 that all of the parties had appeared in the case and began
13 to file answers to the plaintiffs' amended complaint.

14 Now, that's still a year and a half ago. I understand
15 that. But -- I'm sorry, that's not a year and a half ago --
16 that's still nine months ago.

17 The first discovery that was served at all in this case
18 was served in November of 2017, so eight months and change.

19 THE COURT: So it hasn't even been a year yet?

20 MR. BERMAN: Hasn't even been a year of discovery.
21 In addition to that, we all took a break to allow for a
22 mediation that occurred a month ago at Mr. Meadows' offices.
23 So we had pins down relative to discovery among the parties
24 for a period of -- I think it was nearly two months.

25 MR. GORSICH: Couple months, yes.

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1 MR. BERMAN: So the true amount of time that the
2 parties have spent on discovery in this case is less than
3 six months.

4 I think the Court is aware, Your Honor is aware of the
5 damages in the case -- although, there has been some
6 variation -- are something on the order of half a billion
7 dollars. And whether the number goes to \$400 million or it
8 rises to \$600 million, if we lose the case, it's over, and
9 there are 400 miners and their families who are out of work.
10 That's a bankruptcy number for Pinnacle and for Seneca.

11 Judge, in March of this year, March 2018, so that's
12 only four months into the actual exchange of discovery
13 between and among the parties, my clients filed a notice to
14 inspect the asset itself, the Double-Bonus mine that -- that
15 the plaintiff alleges my client flooded and ruined.

16 Now, I want to be very direct. We expected that there
17 may be a fight over who pays for the dewatering and the
18 degassing of the mine, because there is a substantial
19 expense there. That is something we foresaw.

20 Now, it is our view, of course, that the plaintiff
21 would bear the burden of proof, Bluestone ought to have paid
22 for it, they ought have been doing this on their own,
23 without a Notice of Inspection, just to meet their burden of
24 proof.

25 THE COURT: Well, isn't it true, Mr. Berman, that

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1 in most civil cases, when a person is sued, and the
2 defendant wants to do any type of inspection or anything,
3 that they are responsible for paying for it?

4 MR. BERMAN: Well, we -- you know what, for
5 purposes of this discussion, let's take that as a given. I
6 accept that for the moment, subject to some qualifications
7 that I'll give Your Honor later.

8 THE COURT: Sure. But you agree with me, that's
9 normally how it's done?

10 MR. BERMAN: Normally, how it's done, absent
11 multi-million-dollar expense and under the unique
12 circumstances of this case. And no question, if I were
13 going to go look at a -- a personal injury case, something
14 like that, we would pay for our own doctor, sure.

15 THE COURT: So there is some exceptions that --

16 MR. BERMAN: That's where we're going.

17 THE COURT: Okay. All right.

18 MR. BERMAN: But the larger point -- I don't want
19 to derail the Court -- is that we were prompt in filing our
20 motion to inspect the premises. And from March to -- from
21 March 14 of 2018, when we asked to inspect the premises, the
22 plaintiffs took a month to respond -- a little bit less than
23 a month. I believe they responded on May -- on April 12th.

24 And the gist of the response was: No. We're not going
25 to let you inspect the asset.

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1 And we thereafter promptly filed this present motion.
2 And then there was briefing and so forth, and we've gone now
3 from March all the way to the end of August.

4 Now, I am quite confident, Judge, on the basis of our
5 conversation with our experts, that had Bluestone received
6 the motion to inspect -- or Motion to Compel Inspection, and
7 said to us, that's fine, that's certainly a reasonable and
8 imminently understandable discovery request in the context
9 of this enormous case in which we've accused you of
10 destroying a half a billion dollars worth of property and
11 assets. What information do you need?

12 And had Bluestone said, look, we'll work with you --
13 and I'll tell you why that's important, if I may.

14 The federal agency responsible for overseeing any
15 application for dewatering is called MSHA. I think the
16 Court knows that.

17 THE COURT: Sure.

18 MR. BERMAN: Mining Safety and Health. In my
19 colleague's papers, applications to MSHA sort of presented
20 as if they're sent off to Washington D.C. and to a black box
21 at an agency and you don't know when they're going to come
22 out. But that's in practice not how that works.

23 There is -- the mines in question are located in what's
24 called District 12. There is a district manager who is in
25 charge of and responsible for engaging with local operators

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1 on these kinds of plans. I don't have the person's name in
2 front of me -- his name is Brian Dotson. And there is an
3 ADM, Assistant District Manager named Eddie Bailey, who
4 might review the plan in the first instance.

5 The way this works is, a draft plan is submitted to the
6 local district manager here for District 12, and a
7 conversation ensues. In other words, Mr. Dotson or someone
8 on his staff would have us in and sit down and say, you
9 know, I think it does appear that you are trying to get out
10 of putting ventilation into such-and-such area of the mine,
11 but I'd like to see a better circulation, or, I want to make
12 sure that there is a lower concentration of methane gas, for
13 instance. And it would be a collaborative process.

14 Now, this is the rub. We, as the non-operators of the
15 mine, as the defendants, have no standing. There is no
16 mechanism for us to engage directly with MSHA. In other
17 words, we needed the plaintiffs, we needed Bluestone to work
18 with us, because only the plaintiffs, only Bluestone can
19 talk to MSHA about any plan.

20 THE COURT: Because they own the mine?

21 MR. BERMAN: Because they are the operator of the
22 mine. I think the term-of-art is operator of the mine. And
23 that's actually important, because what I want to say about
24 that, Judge, is there are all sorts of ways around that
25 problem. One is, this Court could compel Bluestone to work

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1 with us. For instance, my colleague, Mr. Long made a
2 reference a moment ago to the fact that under a plan we
3 submitted was unsigned and unverified and unsealed.

4 Well, one reason for that is that standing here today,
5 right now, we still have not received a certified mine map
6 from Bluestone. So our experts are doing the best they can
7 with what they have in order to devise a plan.

8 THE COURT: And you have not received, what,
9 from --

10 MR. GORSICH: A certified mine map.

11 THE COURT: A mine map?

12 MR. BERMAN: Yes, a certified mine map. I said it
13 correctly.

14 THE COURT: All right.

15 MR. BERMAN: Now, we do have an auto CAD map, but
16 in order to make progress with MSHA, in order to file a
17 proper application, it has to be accompanied by a certified
18 map. But the point is, there are all sorts of ways. So one
19 thing the Court could do is compel us to work together.

20 Another thing that is done, I understand, not
21 infrequently, is we, Pinnacle, could step in as a
22 contractor, and under applicable MSHA regulations and by
23 virtue of being a contractor, we would then qualify under
24 the relevant regs as the operator of the mine and we could
25 then speak directly to Mr. Dotson.

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1 And the way it would work is that our expert, Mr.
2 Hartsog, who is with us here in the courtroom, and who
3 drafted the initial plan, which is like an opening salvo,
4 would send a letter to Mr. Dotson, maybe follow up with a
5 telephone call. Mr. Dotson would review the plan.

6 THE COURT: And Mr. Dotson works for MSHA?

7 MR. BERMAN: That's right, sir. But importantly,
8 he's not, you know, a bureaucrat off in Washington; he's
9 right here. And he's familiar with --

10 THE COURT: Well, the question I have, Mr. Berman,
11 in terms of MSHA, based upon the review of the pleadings by
12 the plaintiffs, is that MSHA is saying that it's too
13 dangerous to do any type of inspection on this mine. So how
14 does that come into play, if MSHA is saying that it's too
15 dangerous, shouldn't do it; and you have someone that says
16 that MSHA would be able to provide you access to it if you
17 had permission or if you were a contractor with the
18 plaintiffs?

19 MR. BERMAN: I'm glad to answer that, Judge.
20 That's a misstatement of fact. There is an error in Your
21 Honor's question.

22 MSHA has not given an opinion on what can be done. The
23 plaintiffs' experts have said Pinnacle's plan is pie in the
24 sky and MSHA will never approve it.

25 The defendants' experts, my clients' experts have said

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1 this is entirely commonplace to dewater and degas mines.

2 And I would note something that's very important. What
3 we are trying to do is dewater the mine sufficient to allow
4 an extremely trained surgical team of mine rescue experts to
5 get into the mine and to examine the integrity of certain
6 barriers that the plaintiffs have alleged were breached and
7 through which water flowed, allegedly, into their mine.

8 Now, you know, a photograph speaks a thousand words.
9 If we can get our -- it's sort of like a SEAL team to get
10 them in there. Now, getting a mine in shape to do that --

11 THE COURT: Similar to the situation down in,
12 where the kids --

13 MR. BERMAN: Down in Thailand.

14 THE COURT: Thailand, yes, when the kids were
15 stuck in the cave.

16 MR. BERMAN: Fortunately, there are no children in
17 there.

18 THE COURT: Right.

19 MR. BERMAN: But the work that is necessary to get
20 the mine in shape, for a highly-trained team of experts to
21 get in there and do a quick inspection is extremely
22 different than the work that would be necessary to
23 rehabilitate every area of the mine and actually put in
24 working people, you know, 400 miners, rehabilitate the mine
25 and get it up to code and working.

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1 Those are apple and oranges.

2 And that's part of what the Court may have seen in our
3 papers. It is our view that with adequate cooperation from
4 Bluestone, or if we do something more creative, like we step
5 in as a contractor, and thus qualify as an operator of the
6 mine, we could have approval within a month from MSHA, it
7 could be two months, it could be three and a half weeks.
8 But we're not talking about an extraordinarily protracted
9 process. Because it would be the product of a negotiation
10 with Mr. Dotson -- and his ruling, by the way, under the
11 applicable regulations, is law. That's MSHA's ruling. The
12 district managers are empowered to issue rulings, and their
13 decisions are reviewable only under an arbitrary and
14 capricious standard.

15 THE COURT: Do you need any kind of ruling from
16 EPA, or just need it from MSHA?

17 MR. BERMAN: Not to my knowledge, just MSHA.

18 THE COURT: Just MSHA. All right.

19 MR. BERMAN: So, you know, there is a funny thing
20 here, if -- now, this is also important, Judge. I'm told by
21 experts who have done this on dozens of occasions, if the
22 operator of the mine, in this case, Bluestone, is opposed to
23 the plan, then the district manager is very unlikely to --
24 to allow the plan, to approve it. Because it's sort of like
25 nobody wants to buy a company that's embroiled in

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1 litigation; it's a messy situation.

2 So what we really need from the Court -- let me
3 withdraw that last statement.

4 The point I wanted to make, Judge, is that had we
5 cooperated from the beginning, meaning from the time in
6 March when we submitted our inspection request, we would --
7 we would very likely be halfway through the dewatering
8 process already. And so a great deal relative to the timing
9 of this depends on cooperation that we are able to get from
10 our colleagues and counsel for Bluestone. That's one thing.

11 And, quite frankly, a great deal of the delay relative
12 to this motion, which kicked off with our Notice of
13 Inspection in March, without meaning to cast aspersions, is
14 not our clients' fault.

15 It's a consequence of the fact that Bluestone kept
16 saying, no, no, no, no. And it's -- I think Your Honor
17 knows our position, which is that -- the experts tell us,
18 and I think I may be in a position that it's the right time
19 and place to explain it to Your Honor, there is simply no
20 way that our borehole could have caused this flooding. But,
21 right now, we are in a place where the lives of 400
22 families, the lives of 400 families, and half a billion
23 dollars are going to depend on the trial in which we have
24 experts from Bluestone saying, well, we don't know what
25 other event could have caused this. That's sort of their

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1 fundamental contention. And experts from our side saying,
2 there is no way that Pinnacle's borehole could have caused
3 this flooding. But no one will be able to say, hey, the
4 question has been answered; for instance, we took a sample
5 of the water from the area through which Pinnacle's borehole
6 went, and we took a sample of the water from Bluestone's
7 flooded mines, called Double-Bonus, and they've got
8 different bacteria, meaning it wasn't the borehole.

9 So there is the water testing.

10 The other thing we could do is check the structural
11 integrity of these barriers, which is an interesting thing
12 about that. Bluestone is actually required -- you're
13 required to leave about 150 feet of coal barriers when you
14 seal off an area for safety reasons. And for --

15 THE COURT: Is that that rock?

16 MR. BERMAN: Yes. Would it be helpful for you to
17 see it on a map? If I may?

18 THE COURT: Yes, sure.

19 MR. BERMAN: May I move it closer so Your Honor
20 could see?

21 THE COURT: You may. We just need to make sure --
22 will we be able to record that?

23 Dawna, can you pick up on that? Are we going to --
24 hold on one second.

25 (An off-the-record discussion was held between the

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1 Court and Courtroom Deputy.)

2 THE COURT: I'm sorry, Mr. Berman. You can go
3 ahead.

4 MR. BERMAN: Thank you, Judge.

5 What you're looking at -- Your Honor may know this from
6 expertise with coal, but I had to learn it -- but what
7 you're looking at is a top-down view of the Bluestone mine.

8 THE COURT: Mr. Nelson, Mr. Long, can you all see
9 that? You all can move if you need to.

10 MR. NELSON: We're familiar with it.

11 THE COURT: All right.

12 MR. BERMAN: Pinnacle's mine -- so this is like
13 this (indicating.) Right. Pinnacle's mine, if you will,
14 would be on another poster board back here (indicating).

15 The borehole -- this blue area, Your Honor, is a
16 sealed-off area of Bluestone's mine; meaning, they finished
17 mining it.

18 These little black or shaded gray spots or pillars
19 function as support for the roof of the mine so the whole
20 ground doesn't collapse in. And right here (indicating),
21 right in this spot is where Pinnacle dug its borehole
22 through to its own mine back here (indicating).

23 And the allegation that we're faced with is that
24 somehow this borehole -- let me back up -- this white
25 barrier -- this yellow portion is the active portion of

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1 Bluestone's mine.

2 And this white barrier that you see surrounding the
3 sealed-off portion, which is referred to as a district, the
4 white barrier, that surrounds the sealed-off district is
5 what we've been referring to as the -- I called it rock, but
6 it's really, it's a coal barrier.

7 Now, the claim is that when we dug our borehole through
8 to the Pinnacle mine, it caused some form of lateral
9 cracking in these barriers. Like, you know, you can imagine
10 a drill going into the ground and cracks shooting out to the
11 side. All the way through the 63-foot rock barrier, coal
12 barrier here, there's been some suggestion that it came in
13 through this barrier here (indicating), and it deluged and
14 completely flooded the entirety of Bluestone's mine.

15 Now, we have independent evidence -- and I don't want
16 to get too far afield here -- showing Bluestone's mine from
17 the get-go had tremendous water problems, but that it was
18 being controlled with the use of very, very powerful
19 dewatering pumps that were located in the deeper sections of
20 the mine.

21 But if we're able to -- this is where we'd enter the
22 mine (indicating), Judge. And if you think about it as
23 there is a shoreline to a lake here. If we're able to get
24 -- you can use sort of a mobile fan to get adequate airflow
25 here. And you would put pumps in the deepest section of the

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1 mine and start to pump out the lake, and the shoreline would
2 recede.

3 Now, there is an interesting thing. This red right
4 here (indicating) is a series of what's called water traps.
5 And if we were to dewater the Bluestone mine just to there,
6 which could take a matter of weeks, and water is continuing
7 to pour out of these traps, then we know the sealed district
8 remains filled with water, and we know that all the water
9 contained in here (indicating), which is from a, you know,
10 an aquifer, a water source, a lake that sits higher
11 somewhere up here, we know that it hasn't seeped through
12 these barriers. Pure and simple. I mean it's just basic
13 physics.

14 If we drill here (indicating), and this is basically
15 dry, then it's fairly close to game, set, match as far as
16 causation.

17 So, at any rate, what we'd like to do is get in there
18 and look at the structural integrity. I mean, this is a
19 nice piece of evidence, but to get in here and look at the
20 structural integrity of this barrier is obviously of
21 critical importance to us, because it just takes away the
22 speculation.

23 So that's a high-level view. I've probably done that
24 far less eloquently than many of the other individuals in
25 the room could do.

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1 But to get past that initial area where I showed you
2 with the water traps, that could be a matter of weeks. And
3 it will certainly give us some strong preliminary
4 information as to, you know, the issue of causation.

5 But, at any rate, I think the fundamental contention
6 here from our standpoint is, given the enormity of the case
7 and enormity of the consequences, we ought to really have
8 the opportunity to look at this. And Bluestone ought to be
9 compelled to work with us.

10 And at the end of the day, if they're right, their
11 experts are right and this is all Pollyanish and
12 pie-in-the-sky and, hey, we're just crazy for thinking this
13 can be done, well, MSHA will tell us that.

14 Mr. Dotson, who is the federally-appointed expert to
15 make these decisions, will let us know that. He will say --
16 you know, rather than a court which is expert on the law but
17 not on the mining -- this can't be done. And then we've got
18 no complaints.

19 THE COURT: So this plan that you submitted, has
20 anyone from MSHA looked at it as of today?

21 MR. BERMAN: Not yet, sir, because, again, without
22 Bluestone's assistance, we can't submit it. We have no
23 standing, which is the source of the Motion to Compel. We
24 need them to help us.

25 THE COURT: And you just submitted this plan to

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1 Bluestone, what, last week?

2 MR. BERMAN: Yes. And the reason we submitted it,
3 actually, it was -- it sort of came about organically. On
4 the phone call with Judge Johnston, we wound up getting
5 into -- a telephone hearing, I should say -- we wound up
6 getting into sort of a wide-range discussion about the
7 Motion to Compel, what would happen and how it would be.

8 And one of the things my colleagues from Bluestone
9 contended to the Court was, well, Pinnacle hasn't even put
10 together a plan yet.

11 Our response to that is, of course, we didn't want to
12 put together a first draft until we have the necessary
13 materials and the cooperation. But we didn't want that
14 question to be hanging out there for Your Honor or for Judge
15 Johnston. And we wanted to make very clear that a plan can
16 be put together. We did it within a matter of a week or
17 weeks.

18 And, again, Mr. Dotson, the district manager, is not
19 going to take the plan and say, "Approved." He'll call in
20 our experts and he'll say, you know, I've got some concerns
21 about -- may I approach again?

22 THE COURT: Yes, sure.

23 MR. BERMAN: There was, evidently, a fan here
24 during -- a large fan here that ensured airflow kind of
25 shoots down and comes back off these barriers and

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1 circulates. But there was more of a permanent fixture here,
2 a fan, but evidently we've -- now that's been removed. But
3 that's fine. So we may face a question from Mr. Dotson
4 about how we intend to ventilate this passageway.

5 And the answer is that they are all a matter of mobile
6 fans of varying sizes and strengths that can be brought in
7 and used as the rescue squad advances through the mine
8 itself to ensure -- and then we'll make sure that there are
9 the required two means of egress or escape routes and so
10 forth.

11 But this is a conversation between folks with a great
12 deal of technical knowledge. And it ought to be a matter of
13 weeks until we're able to develop a plan that we believe is
14 satisfactory to the MSHA district manager.

15 THE COURT: So this plan that you've submitted is
16 kind of in the working stages; it's not final or -- is this
17 something that you're working towards?

18 MR. BERMAN: That's correct.

19 THE COURT: And you need some more information in
20 order to kind of finalize it?

21 MR. BERMAN: Correct.

22 THE COURT: And you need assistance from the
23 plaintiffs to help in that regard?

24 MR. BERMAN: Correct.

25 THE COURT: Okay.

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1 MR. BERMAN: Correct.

2 THE COURT: Anything else?

3 MR. BERMAN: I think, Your Honor, unless you have
4 additional questions, and I would like to reserve the
5 opportunity to respond, if necessary, but I've got nothing
6 further.

7 THE COURT: All right. Thank you, Mr. Berman.
8 Mr. Long, or, Mr. Nelson, what says the plaintiffs, because
9 in looking at this, and when I was reading over this plan,
10 to me, this appears to be the first time something
11 constructive had been offered. And I know that you all have
12 rejected it, but I want you to address this from the
13 standpoint that the defendants are entitled to some way to
14 prepare their defense in this case, don't you think, in
15 terms of trying to get some idea what it's going to take to
16 show whether or not they were at fault causing this, all
17 this water damage, if you will.

18 MR. LONG: I couldn't agree more, Your Honor. And
19 that's why when the Fourth Circuit talked about this in
20 *Belcher*, they said, you know, go out and take some
21 depositions before you come running for inspection.

22 And they've not taken one deposition.

23 They act as if discovery just started. We filed
24 extensive Rule 26(a)(1) disclosures in February of 2017.
25 And to give you further background, we filed, down in the

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1 Beckley Division, a complaint seeking injunctive relief in
2 2015, late spring of 2015, over this whole issue. Pinnacle
3 was a party; they were aware of this.

4 They've had more than three years to come up with a
5 plan. They could have proposed something in that
6 litigation, they could have filed a miscellaneous action,
7 they could have sought a temporary restraining order -- they
8 could have done a lot of things if they wanted to.

9 In fact, when they were drilling the borehole, when
10 they realized they were deviating from the plan and were
11 going to have real issues from the cement job going through
12 a mine, they might have said, wait, let's just take this
13 stuff out and run a cement bond log.

14 THE COURT: What's that?

15 MR. LONG: It's just -- you run an instrument down
16 and you check and see if there is a good cement bond, you
17 know, which goes around the metal casing. But they could
18 still do that. They could still drill a borehole down if
19 they want to look and test water like they talk about; they
20 could have for years.

21 They talk about no discovery done. They have served
22 hundreds, and I mean hundreds of requests to produce,
23 hundreds of requests for admission. By last count, over 400
24 interrogatories and still rising; yet, they've never taken a
25 deposition. They have not even chose to depose former and

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1 current Bluestone employees that were underground,
2 witnessing this massive flooding -- and we have video, but
3 unfortunately we didn't give you notice, about two
4 minutes -- it shows massive flooding.

5 It's not going through the coal barrier like he's
6 talking about; it's coming over top. You take one look at
7 that, it's completely unsafe. Okay. Now, and I want to
8 bounce around a bit, because he did. And I apologize.

9 THE COURT: You don't have to apologize, Mr. Long.
10 There's a lot of stuff in this case. And I'm sure you all
11 have been dealing with this for a while, just based on what
12 I've read the last couple days, there's a lot of material
13 there.

14 MR. LONG: And they talk about 400 families. What
15 about our families that can't work at this mine? I find
16 that a little bit disingenuous, given that we have
17 information they're pulling their mine equipment out of
18 their mine now.

19 THE COURT: How long has this mine been closed?

20 MR. LONG: Since January of 2016; is that right?

21 MR. NELSON: No. We stopped production in '13.
22 Everybody was out in January '16.

23 MR. LONG: Right. So to give you some
24 background -- again, I'm going to jump a little bit.

25 THE COURT: Sure.

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1 MR. LONG: When this all happened in the March of
2 2015 time frame, Dave Altizer, who is the chief engineer for
3 Bluestone Resources, parent of Bluestone Coal and
4 Double-Bonus, was tasked by Tom Lusk -- and they're here
5 today -- as the chief operating officer then, as the chief
6 engineer, to go out and find a way for us to reopen this
7 mine, you know, explore every opportunity. And he did that.

8 There is a series of memos. We produced one, which was
9 July 30, 2015, Mr. Altizer reached a conclusion: "I've
10 looked at everything. It can't be done safely."

11 He predicted what was going to happen would be, there
12 would be an influx of methane, like Sago methane. Well,
13 guess what? In January, 2016, it happened.

14 First cross-cut out away from the seals, the first main
15 seals, so it's the first cross-cut away from that, maybe 20
16 feet away, readings were taken of 2.4 percent methane.

17 That is a red flag. That means places in that mine,
18 there is explosive concentration of methane, which means
19 between 5 and 15 percent. You had to get from 15 percent,
20 which they conceded it was, behind the sealed area or more,
21 to 2.4 percent outby. So there are explosive
22 concentrations.

23 Mr. Lusk, you know, would testify that his primary
24 responsibility as the chief operating officer is the safety
25 of the men and women working that mine.

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1 He immediately said, "Pull the power and pull the men."

2 They had every incentive to reopen this mine. It's
3 mind-boggling to me to suggest that somehow this is a
4 litigation ploy to ruin a mine, roll the dice in litigation
5 and try to recover. When we have lost, by our own expert,
6 Seth Schwartz [phonetic] in today's boom met market, by the
7 time we go to trial, in profit over \$60 million.

8 Now, do you think we have every incentive to reopen
9 this mine if we could? And we would if it could be safely
10 done.

11 That's -- at the end of the day, it's about safety.

12 Okay. Now, and I've just gotten to know Mr. Berman
13 over the last couple months, and I know he's a little bit
14 new, he expressed that, to the mine business, so to speak.
15 But the things he was pointing to, these pillars, they have
16 all been pulled. You've heard of secondary mining,
17 pillaring. They've pulled all those pillars. You can't get
18 back in there. It's rubble. It's a void. And that's what
19 they were putting borehole through, a void; not into
20 something solid, into a void.

21 And to, you know, digress a bit. I'm amused that they
22 don't have a map. But here we go, we got a map.

23 We produced hundreds of maps. And MSHA has a certified
24 map on record and would not need another one. And, oh, by
25 the way, they can submit a plan directly to Mr. Dotson if

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1 they want. They can submit a generic plan.

2 THE COURT: They don't need you-all's approval or
3 cooperation?

4 MR. LONG: They don't need us. By the way, this
5 lateral cracking -- we're not claiming lateral cracking.

6 We are claiming they put -- basically put a lightning
7 rod through our mine. They were supposed to put conductive
8 metal casing through our mine -- I mean, nonconductive.
9 They didn't. They put conductive and they tried to paint it
10 in 25-degree weather. So you've got methane we're talking
11 about with a lightning rod in one of our mine sections. Not
12 to mention, we have a belt line that runs all the way down
13 the first mains that would be kind of conducive to
14 electrical strike.

15 And if you remember in Sago, the theory was there was
16 an old gas well about 150 feet away from the apex of the
17 explosion, and a lot of ground strikes and lightning that
18 night. And the theory is that it went from that well bore
19 over to the mine and caused an explosion. And that wasn't
20 the definitive cause, but that is a strong theory that's
21 what happened.

22 And this is -- I can't -- you know, I can't emphasize
23 this enough. Understand, 2.4 percent methane, that is a big
24 deal in the mining industry. They don't even care -- MSHA
25 doesn't even care if there is an ignition source. Because

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1 we've learned from history in mining catastrophes, you
2 haven't thought of all of them.

3 So you have this concentration. They don't need to
4 have an ignition source. Once you're over 1 percent, you're
5 out. Okay.

6 And at the time, we did that, which was the right
7 decision, the decision of the law we had to make. We had a
8 fully operational ventilation plan, optimal conditions.
9 Natural courses, it was flowing 20 to 30,000 cubic feet per
10 minute, blowing across that face.

11 THE COURT: And that was to remove the methane
12 gas?

13 MR. LONG: Absolutely, yes. You've heard of
14 blowing ventilation, just blow it right across the face.

15 THE COURT: Well, let me ask you a question. In
16 terms of this mine, was there a problem with methane gas and
17 water or just one?

18 MR. LONG: Well, it's really in combination. I
19 mean, because what happened -- another red herring I just
20 got to digress and deal with. I keep seeing in pleadings
21 that we flooded our mine on purpose to create this
22 litigation bonanza; you know, it's a fraud and it's a sham,
23 it's -- whatever other language you can think of they put in
24 the pleadings directed to us.

25 It is sound engineering principles in the mining

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1 business for sealed-off sections, mined-out sections,
2 secondary mine sections, if they are below elevation, in
3 other words, what's left to be mined or inactive mines, if
4 it's below that elevation, in other words, downhill, it's
5 prudent to fill them with water, because it reduces the
6 methane; you fill up the space.

7 THE COURT: So the drilling that they did, did
8 that affect the methane, the water, or both?

9 MR. LONG: Well, it affected the water,
10 ultimately.

11 THE COURT: Because the mine was flooded; is that
12 correct?

13 MR. LONG: Well, it is now. But what happened --
14 the plan was to flood, you know, first mains behind the
15 seals. Over time, gradually, it was set up to handle
16 whatever we discharged out of that, pumped out of the mine
17 portal. It was by plan.

18 It wasn't like some sinister, let's flood the mine.

19 That's what prudent people do. And then the borehole
20 was drilled. And about a year later, in probably one of the
21 highest elevations of the mine, now, second right, within a
22 matter of days , reacting to excessive storms on the
23 surface, is flooded. It's pouring over the ceiling from
24 second right in front of the seals and first mains, and we
25 can't control it. It's many --

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1 THE COURT: So water is free-flowing?

2 MR. LONG: Free-flowing. Again, if you see the
3 video -- I'm really kind of surprised they even went
4 underground to even be there for this. It's coming through
5 the roof bolts, and, you know --

6 THE COURT: Let me ask you this, Mr. Long. In
7 terms of trying to get to a position where there could be
8 some type of inspection done of this mine, because based
9 upon pleadings I read from the plaintiffs is that MSHA is
10 saying nothing can be done in terms of trying to have this
11 mine in a situation where they can do an inspection.

12 Is that correct or am I misstating that?

13 MR. LONG: I think you're misstating.

14 MSHA has not said it can't be done, because they
15 haven't been asked --

16 THE COURT: Well, your experts?

17 MR. LONG: Yes. Well, he's our expert, but he was
18 the chief engineer at the time.

19 THE COURT: Of that mine?

20 MR. LONG: Right. All this was going on
21 pre-litigation now and these decisions were being made.
22 Think about that. This is one of the best -- in our
23 lifetimes, this is one of the best met market ever.

24 We're operating other mines. Why wouldn't we operate
25 this one? Why wouldn't we want to spend the capital that

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1 they choose us not to be willing to spend if we thought it
2 could be done?

3 And you know why we don't do it?

4 It's not safe.

5 THE COURT: Well, let me ask you this: The
6 Inspection Plan that they submitted, I understand they just
7 submitted it I think on August 3rd, have you all reviewed it
8 and rejected it, the entire plan?

9 MR. LONG: First of all, it's not a plan. I mean,
10 for instance --

11 THE COURT: It's not a plan?

12 MR. LONG: No. It's a theory. It's a start,
13 maybe. But we've reviewed it enough to know it's not
14 feasible and MSHA would never approve it. Dave Altizer
15 issued a report, which we've provided, saying all the
16 reasons it's not.

17 THE COURT: But up until that plan that was
18 submitted, they had not submitted anything else?

19 MR. LONG: No. They had submitted affidavits,
20 generically saying it could be done for five to eight
21 million dollars.

22 THE COURT: And they wanted you all to pay for it?

23 MR. LONG: Yeah. From the very settlement, by the
24 way, that they challenged as not being in good faith because
25 it wasn't enough.

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1 THE COURT: What, if anything, could be done to
2 get a plan that's agreeable to both sides, if it can be
3 done? I'm just -- my whole purpose here is trying to see
4 whether there can be something that would accomplish the
5 goal of giving them the opportunity to do some inspection,
6 and it would be agreeable to the plaintiffs to allow that to
7 happen since it's your mine. But I'm hearing mixed signals
8 in that it would be too dangerous.

9 MR. BERMAN: May I address that?

10 MR. LONG: If I could --

11 THE COURT: Let's let Mr. Long finish.

12 MR. LONG: If I could approach the Court with a
13 picture of the mine, Your Honor.

14 THE COURT: Yes, sir.

15 MR. LONG: I guess that would be Exhibit 1,
16 Plaintiffs', perhaps. That's just to show you what --

17 THE COURT: Yes, let's put a sticker on it.

18 MR. LONG: That's the mine portal, Your Honor.
19 That's outside.

20 THE COURT: I'll let her mark this first. Go
21 ahead. I'll just write on it. It will be Plaintiffs'
22 Exhibit Number 1.

23 MR. LONG: Thank you, Your Honor.

24 THE COURT: All right. Mr. Long.

25 MR. LONG: Well, to answer your question, there is

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1 no plan that we believe can be safely implemented. They're
2 talking about -- I mean, going back to my point where we had
3 the ventilation system operating at its peak, before you had
4 blackdamp and all this methane in the environment, before
5 you had roof collapses and rib falls, because of flooding,
6 their expert testified in unrelated litigation, but the same
7 expert said, if you have all this water, it causes this
8 pillar punching, which will severely damage the top; you
9 can't do anything.

10 Well, we've had three years of flooding. Now that the
11 shoe is kind of on the other foot, it's okay to go
12 underground. But when we had optimum ventilation, we had to
13 abandon the mine.

14 Now they want to put a makeshift -- some type of plan
15 together to think it's going to be a better ventilation plan
16 than what was running. Not to mention, think about what
17 they are talking about doing, just by the very nature, mine
18 rescue personnel? Mine rescue apparatus for a civil
19 litigation?

20 These men -- he's a seven-time mine rescue champion,
21 Dave Altizer is four. You know why they go underground?
22 You know. They go underground to save people and recover
23 bodies. They don't put themselves at harm's way to go
24 underground to go visualize something that MSHA personnel
25 have seen and our people have seen; yet, they've chosen not

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1 to depose to get the information from them. They could get
2 all they need from them.

3 THE COURT: By way of a deposition?

4 MR. LONG: Deposition. Just depose some people.

5 Oh, by the way, Judge, we're talking a mile
6 underground.

7 THE COURT: A mile?

8 MR. LONG: A mile.

9 THE COURT: All right.

10 MR. LONG: If I could look at my notes real quick?

11 THE COURT: All right. Give him a second, Mr.

12 Berman. Let him finish up.

13 MR. BERMAN: Sure.

14 MR. LONG: Just if I could, Judge Johnston denied
15 the Motion to Stay predicated on this. And he basically
16 told defendants, you're lucky I'm giving you 60 days.

17 What they want to do, they can't get done even by the
18 close of discovery with this current schedule.

19 THE COURT: Well, that is one of my concerns,
20 because as I read the pleadings, I read someone stated that
21 it may take, at least, up to -- at least six months.

22 MR. LONG: Their chief engineer testified it would
23 take at least six months. They talk about dewatering. This
24 is way more than dewatering.

25 You're talking about methane gas now. This isn't

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1 simply dewatering a mine.

2 THE COURT: Well, let me ask you this, Mr. Long,
3 is there any alternative to assist the defendants in
4 gathering some information that they could use in the
5 defense of this case in terms of any type of inspection that
6 can be conducted of this mine?

7 MR. LONG: They could drill a borehole, if they
8 want to test water; they could do that. They could actually
9 lift the pump out -- I mean, they could now because it
10 sounds like they've cut back, they're not producing anymore,
11 and go run a Smith bond log if they want to. There are
12 things they can do.

13 And, again, I come back to depose people. Most of them
14 work for us. They may be even mad at us. I think they've
15 talked to some of them. Okay, find out what the situation
16 was like before, one, much less them, or us -- which I can't
17 fathom -- spend the money to do that when we think it can't
18 be done safely. You're basically -- I can't imagine being
19 in your position, being asked to compel somebody, a company,
20 to do something that they fundamentally believe they can't
21 do because it's not safe.

22 THE COURT: That's the issue, based on what I've
23 viewed, to require you all to do something that appears to
24 be unsafe. And that's why I'm looking to see whether there
25 are any alternatives.

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1 MR. LONG: Well, I mentioned a couple. I mean,
2 common sense, I mean, you -- we don't leave it at the front
3 door when we walk in the courthouse. \$60 million in profit,
4 you don't think we'd have rehabbed this mine and gone at it?
5 I mean, it defies common sense.

6 THE COURT: Okay. Anything else, Mr. Long?

7 MR. LONG: By the way, it's not just one agency,
8 it's at least three or four that there has to be approval;
9 you've got DEP, you've got EPA, West Virginia All Surface
10 Mining, Health and Safety --

11 THE COURT: So you have to have approval from all
12 these agencies?

13 MR. LONG: There's water discharge issues and
14 everything else.

15 THE COURT: So that would be MSHA, EPA -- and who
16 else?

17 MR. LONG: Oh, I'm sorry. EPA, DEP, MSHA, and
18 then the state equivalent, West Virginia Office of Miners'
19 Safety, Health, Miners' Training -- or something like that.

20 THE COURT: So that's at least four different
21 agencies?

22 MR. LONG: Couple of -- I'm sorry. That's four, I
23 guess.

24 THE COURT: All right.

25 MR. LONG: Now, and I probably should have

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1 mentioned this upfront. You granted the motion to consider
2 some other stuff today.

3 THE COURT: Right. I granted both motions on both
4 sides, because it was helpful to the Court to try to get a
5 better feel for this.

6 MR. LONG: But think about really why we're here.
7 It was a Motion to Compel, based on a Notice of Inspection
8 filed in March of this year, right, to which they said -- we
9 responded by e-mail two days later, and said, it's closed.
10 MSHA -- here's the pictures; you can't do this.

11 So it's not like we didn't get back to them right away.
12 And here we are now, you know, with the Motion to Compel
13 that existed then, it was a practical and legal
14 impossibility.

15 It was practically impossible to meet what they set as
16 their inspection deadline, because their own chief engineer
17 said it's going to take minimally six months, if you could
18 ever get approval, which we don't think you could. That's
19 number one.

20 And number two, it's legally impossible, because they
21 knew we had to get MSHA approval. We put them on notice;
22 they knew we were in temporary idle status.

23 They knew to do what they wanted to do, we'd have to
24 pump hundreds of millions of gallons of water. And they set
25 it a month later and then filed a Motion to Compel on the

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1 heels of that. That's really why we're here.

2 But now at the eleventh hour they drop this -- I'm not
3 going to phrase it and call it a plan -- it's not. It's not
4 signed, it's not sealed. I'm told that you'd have to have a
5 minimum of 50 maps, minimally, to submit with this to show
6 MSHA what you're going to do. You can't --

7 THE COURT: Well, based on what you're saying,
8 MSHA may not approve this plan as it's written. Is that
9 what you're saying, Mr. Long?

10 MR. LONG: I think that's a very good possibility.

11 THE COURT: Okay.

12 MR. LONG: But to get to that point -- first of
13 all, to get to that point, six months, maybe a year, a lot
14 of money being spent. And then say we get to that point --
15 say they said that we're not really worried about methane,
16 we think it can be controlled better with this makeshift
17 plan versus the way you were doing under normal
18 circumstances. What do we know we're going to get, you
19 know?

20 THE COURT: All right. Anything else, Mr. Long?

21 MR. LONG: Not at this point.

22 THE COURT: All right. Mr. Berman, I'll give you
23 the last word.

24 MR. BERMAN: Thank you, Judge. We talked about --
25 Mr. Long has talked about common sense. If all of this is

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1 right, if everything Mr. Long is saying is correct: This is
2 too dangerous, there is methane, it can't be done --

3 THE COURT: But you agree that methane would be
4 something that you need to be aware of because that presents
5 a dangerous situation?

6 MR. BERMAN: Absolutely. And our experts have
7 looked at this carefully and said this can be properly
8 ventilated. Absolutely. But if everything Mr. Long is
9 saying is true, that it can't be done, and that with an
10 extremely dangerous and combustible situation, it can't be
11 remediated or addressed through the use of appropriate
12 technology, MSHA will make that decision and tell us to go
13 pound sand.

14 THE COURT: Can it be done in less than six
15 months?

16 MR. BERMAN: We believe it can, on one condition,
17 which is that Bluestone has to provide us with some of the
18 information we need. Now, there are a couple of things that
19 Mr. Long said, respectfully, that are not correct, and I'll
20 address those in a minute. Like, for instance, most
21 importantly, that we can go to MSHA without Bluestone,
22 without the operator of the mine.

23 We can't do that. That's what I'm told by my experts
24 definitively.

25 But it's a funny thing, right, Bluestone is saying, you

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1 guys destroyed our mine, you flooded our mine, and you
2 caused us \$600 million in damage.

3 And we said, great, let's see it.

4 And they said, can't be done.

5 Says, who?

6 Well, says them.

7 They are saying it's too dangerous.

8 MSHA is not saying that.

9 This is a decision -- and we're really not asking for
10 that much. We're asking for the right to take this request
11 to the agency that has specialized expertise. I mean, mines
12 always have problems.

13 THE COURT: What about those agencies, Mr. Long
14 indicated there were at least four agencies you'd have to
15 get approval from?

16 MR. BERMAN: My understanding -- and if the Court
17 will indulge me for a second, I just want to confer with my
18 expert. My understanding is that the difficult approval to
19 get, the one that will require work and negotiation will be
20 from MSHA.

21 THE COURT: So you have to start with MSHA and
22 work your way down?

23 MR. BERMAN: And once we get MSHA approval, we're
24 really there. But let me just double-check that to make
25 sure I haven't misrepresented anything to the Court.

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1 THE COURT: Sure.

2 (Pause.)

3 (An off-the-record discussion was held between Attorney
4 Berman and an expert.)

5 THE COURT: Yes, sir.

6 MR. BERMAN: Thank you, Your Honor.

7 What I represented to the Court is in sum and substance
8 correct. MSHA is going to be the tough one. In fact, we
9 understand as far as the DEP goes, that Bluestone may
10 already have certain relevant permits in place.

11 I want to leave something -- I want to leave no doubt
12 in Your Honor's mind about something. We will pay for this,
13 however much money this requires. Mr. Brent Mickum is in
14 the room, general counsel, and in power to speak on behalf
15 of the company. We will pay for this.

16 THE COURT: For the inspection?

17 MR. BERMAN: For the inspection. All of the costs
18 associated with getting adequate ventilation, with ensuring
19 they wear those little methane meters, and ensure that the
20 concentration of methane is safe. And I respect the mine
21 rescue team of Bluestone. We are not asking them to do
22 anything.

23 We are going to use our mine rescue team to go in. So
24 let there be no doubt about that. We will pay. We will use
25 our mine rescue experts.

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1 But the big thing that sticks in my mind is if this
2 were all true, it just couldn't be done, if it were
3 impossible, why is Bluestone fighting tooth-and-nail to
4 prevent us from even asking MSHA.

5 I would respectfully submit that the answer is, because
6 it's not that hard, because we will get approval from MSHA.
7 And once that happens, the jig is up. Because we have
8 information -- may I approach again?

9 THE COURT: Yes, sir.

10 MR. BERMAN: We have information -- and I don't
11 know that it will be helpful to the Court to detail -- but
12 from eyewitnesses. First of all, Bluestone stopped mining
13 in 2012 or 2013, I can't remember.

14 This is the lowest elevation point of the mine
15 (indicating).

16 We have information, reliable information from
17 eyewitnesses that Bluestone shut off its own deepwater pumps
18 that were responsible for pumping -- let this number sink
19 in -- 500 gallons of water per minute. They shut them off
20 years before Pinnacle drilled its borehole, which means that
21 everyone at Bluestone, the folks we've spoken to, knew it
22 was simply a matter of time before this was going to flood
23 and fill up.

24 THE COURT: So the Pinnacle mine -- if I'm reading
25 this correctly, the Pinnacle mine is close to the Bluestone

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1 mine?

2 MR. BERMAN: The Pinnacle mine is beneath the
3 Bluestone mine.

4 THE COURT: Beneath the Bluestone mine.

5 MR. BERMAN: That's right. Now, the fact that the
6 pillars in the sealed district have been taken out and
7 there's been a settling or a collapse, completely
8 irrelevant. We're not going in there.

9 We'd like to go under this portion of the mine and
10 inspect the integrity of the barrier (indicating).

11 And so, the other thing is, Mr. Mickum, our D.C.
12 suggested something right now.

13 THE COURT: Mr. who?

14 MR. BERMAN: Mr. Mickum, who is the general
15 counsel of my client.

16 THE COURT: Can you spell that, if you know, for
17 the court reporter.

18 MR. BERMAN: Yes, sir. It's, M-I-C-K-U-M.

19 THE COURT: All right. Thank you.

20 MR. BERMAN: Another creative solution -- so,
21 again, we want to the right to go to MSHA and let them
22 decide. We will pay and we'll use our mine rescue
23 personnel. But if the Court has concerns, this is kind of a
24 great candidate for a special master to report to Your
25 Honor, as we -- you know, the order to compel could be

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1 limited, it could require the parties to work together to
2 submit the plan to MSHA.

3 And then if the special master, who would be
4 representing Your Honor, has any concern that there is sort
5 of mucking around or either that we are not cooperating
6 properly or that we have, you know, embarked on a fool's
7 errand, that special master can report back to the Court.
8 That would be one solution that -- Your Honor asked for some
9 creative solutions.

10 The other thing is that we don't think for the reasons
11 that I explained to you having to do with the water traps,
12 we may not need to go all the way in. It may suffice for
13 our purposes to get past this area of traps (indicating),
14 and see that water is still pouring out. Because if water
15 is still pouring out, that means this is still full
16 (indicating), and we didn't cause the flooding by putting
17 the borehole through there.

18 THE COURT: But that's the kind of information you
19 need, though, right?

20 MR. BERMAN: That's exactly right. That's what we
21 got to understand.

22 THE COURT: If it's there.

23 MR. BERMAN: If it's there. And if MSHA says to
24 my clients' experts, "You are out of your mind," then we
25 will not get the right to do this, and we will proceed to

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1 trial and do the best we can to defend ourselves without
2 this evidence.

3 One final word, Your Honor, which is, we certainly have
4 served requests for the production of documents. They have
5 served requests for the production of documents. We will be
6 taking depositions; they will be taking depositions.

7 Nothing --

8 THE COURT: Your request for production of
9 documents, is that the one that was just filed on August
10 9th?

11 MR. BERMAN: There were various requests for the
12 production of documents, going back to the end of 2017.

13 THE COURT: Okay. But you filed a new one on
14 August 9th, ECF No. 208; is that correct?

15 MR. BERMAN: Oh, that's a Motion to Compel the
16 production of additional materials. We have -- and I don't
17 want to stray too far afield, but we understand that all of
18 the Bluestone executive team have laptops and correspond
19 regularly by e-mails, and I think if -- Ron, correct me if
20 I'm wrong -- to date, we received something in the order of
21 25 e-mails, which suggests to us that the production is
22 radically incomplete, and we don't want to proceed to all of
23 the depositions without the materials.

24 THE COURT: Well, this request was only filed on
25 August 9th, so the plaintiffs need an opportunity to

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1 respond. So --

2 MR. GORSICH: If I may, Your Honor? Ron Gorsich
3 on behalf the defendants. That was a Motion to Compel
4 production. It's about requests that have been sent months
5 back. They've had ample opportunity to respond. We've met
6 and conferred; had the opportunity to supplement their
7 discovery. Now this is a Motion to Compel, because we
8 believe they haven't produced everything that they should.

9 THE COURT: Well, all I'm saying is that this was
10 just filed on the 9th, so they have a right to respond
11 before I rule on it.

12 MR. GORSICH: Oh, absolutely.

13 MR. BERMAN: Correct. And I'm not trying to say
14 that it's before the Court today. It's certainly not.
15 The only relief we are seeking is an order from Your Honor
16 allowing us to take -- they said it can't be done; we say it
17 can be done. We would respectfully request that we be
18 allowed to take that to the expert.

19 THE COURT: Well, what I want to do is to have the
20 parties meet and confer to see if something can be done in
21 order to do this inspection. I would ask that you all do
22 that in a short time frame, what, 10 days?

23 MR. BERMAN: That would be sufficient.

24 THE COURT: Mr. Long, is that sufficient?

25 MR. LONG: Whatever the Court orders, but I would

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1 like to respond to some of the new things he brought up, if
2 I could.

3 THE COURT: Yes, sir.

4 MR. LONG: First of all, this is nothing but
5 another attempt for massive delay of this trial. This is an
6 end run, in my view, on Judge Johnston's recent
7 consideration of the motion to continue. I mean, it's
8 nothing but that. They've had years to do this. If you're
9 at all inclined to do it, I mean, which -- again, given the
10 safety considerations, I would at least say, take some
11 depositions, prove to me you can't get what you say you
12 need.

13 THE COURT: Well, I can't make them take
14 depositions, Mr. Long.

15 MR. LONG: Yes, but you can refuse their Motion to
16 Compel on the basis -- like the Fourth Circuit did in
17 *Belcher*.

18 THE COURT: Well, what I would like to do is give
19 you all 10 days, since they have since presented some type
20 of plan, I'll give you 10 days to see whether this can be
21 done, that's agreeable to both sides, then to advise the
22 Court the results of that meeting and conferring. And then
23 if nothing has been accomplished, then the Court will issue
24 a ruling.

25 MR. LONG: All right, Your Honor. We would, at

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1 least -- if he's here today, is their expert going to verify
2 this plan? I mean, what are we supposed to review? We've
3 reviewed some unverified, unsigned, anonymous plan.

4 THE COURT: Mr. Berman.

5 MR. BERMAN: I hope this is something we can work
6 out in the next 10 days.

7 MR. LONG: Well, we're here.

8 MR. BERMAN: We ought to be able to get and still
9 haven't gotten a certified mine map from Bluestone.

10 MR. LONG: They're at MSHA. MSHA doesn't need a
11 certified map.

12 THE COURT: Well, argue to me. Don't argue to
13 each other.

14 MR. BERMAN: Yes, I stopped myself. The plaintiff
15 is in possession of that proper request in discovery and
16 they've been withholding that.

17 THE COURT: Well, when you all meet and confer,
18 you all can discuss that, whether that's available, the map
19 is available.

20 MR. BERMAN: Judge, I would ask -- and I think Mr.
21 Long may be in agreement -- I may be actually predicting
22 what my colleague is going to say -- but in connection with
23 this order that we meet and confer, would you also order
24 that the expert be present, because I think that would be
25 very helpful.

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1 MR. LONG: Can I make a point there?

2 THE COURT: Yes, sir.

3 MR. LONG: We make the point in our response, they
4 didn't meet and confer with us. We could have done this in
5 May. We brought Dave Altizer. Now they want to meet and
6 confer, you know, follow the rules.

7 THE COURT: Well, this is one last chance.

8 MR. BERMAN: Thank you, Your Honor.

9 MR. LONG: I would ask -- first of all, we go
10 right back to we deliberately shut -- yeah, we shut those
11 pumps off on purpose. He talks about it. That was designed
12 to fill up first mains. We shut -- we pulled them. It's
13 not nefarious; it's a plan.

14 MR. BERMAN: But it's still --

15 THE COURT: Let him finish.

16 MR. LONG: We did fill the mine by design --

17 THE COURT: Argue to me, Mr. Long.

18 MR. LONG: Now, if they are going to do all --
19 they are going to pay the costs, I assume.

20 THE COURT: They said they're going to pay the
21 cost for the inspection and they will use their mine rescue
22 team if necessary.

23 MR. LONG: Think about that. They are going to
24 use a mine rescue team for a civil lawsuit inspection? Be
25 that as it may.

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1 Are they going to post a bond?

2 We would request a significant bond. We'd like to be
3 able to brief that issue. If they are going to go around
4 messing around our mine, could destroy things, could kill
5 somebody, we'd like a bond, and probably some type of
6 indemnity agreement and a lot of other things.

7 THE COURT: That's something you all need to
8 discuss, if you all -- if that's something that can be
9 worked out. If not, then I think you ought to come back to
10 the Court.

11 MR. BERMAN: MSHA will impose that restriction,
12 so Your Honor knows. If Mr. Dotson or one of the district,
13 assistant district managers deems this to be very
14 dangerous -- or they will often say, you're going to have to
15 post a bond.

16 So if that's the order from MSHA, we'll comply with it.

17 May I address one final point, Judge, just as it
18 relates to Judge Johnston? And, certainly, I would urge
19 Your Honor to talk to him.

20 THE COURT: I will. I plan to confer with him.

21 MR. BERMAN: But this is not an end run. What I
22 asked for directly is, Judge, doesn't it make sense for you
23 to look at the Motion to Compel , too? Because if that's
24 granted, it would necessarily move the trial back from
25 January to maybe, you know, could be April, May. I don't

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1 want to predict.

2 But he said, I'm going to leave that decision to Judge
3 Tinsley, and if that has an effect on the scheduling, it has
4 an effect on the scheduling. But we're not talking about
5 years.

6 THE COURT: Well, right now the trial is scheduled
7 for -- or was, November 13th, 2018. That has been moved now
8 to January?

9 MR. BERMAN: Yes, sir.

10 THE COURT: Okay.

11 MR. BERMAN: But Judge Johnston is keenly aware, I
12 think, that we're here today and the motion is pending
13 before Your Honor, and that, if granted, it -- it certainly
14 could affect the trial date. We may be able to get this
15 done very quickly. But if we can't, he is absolutely --
16 there is -- I simply take issue with the notion that this is
17 an end run around his order. It's not. It's all
18 aboveboard.

19 THE COURT: All right. Well, today is August 10th
20 [sic], I'm going to give you all till next Friday, which is
21 the 24th, to meet and confer and then report back to the
22 Court whether there has been any progress in working out
23 something to be done. And, if not, then the Court will make
24 a ruling accordingly.

25 MR. LONG: Can we ask the Court to determine or

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1 direct that they submit a verified, signed plan before we
2 meet and confer?

3 THE COURT: Can you do that, Mr. Berman?

4 MR. BERMAN: We don't have the documents --

5 THE COURT: You don't have the map?

6 MR. BERMAN: -- necessary.

7 Mr. Meadows, do you want to address why that's
8 impossible for us at the moment?

9 MR. MEADOWS: Are you talking about with respect
10 to the documents or the map?

11 MR. BERMAN: With respect to our submitting a
12 certified map as Mr. Long is requesting.

13 MR. LONG: I'm just asking --

14 MR. BERMAN: A certified plan.

15 THE COURT: Wait a minute. Mr. Long wants a
16 certified plan that has been signed by someone from your
17 side.

18 MR. BERMAN: So, Mr. Hartsog simply doesn't
19 understand what's being asked for.

20 MR. LONG: I'm asking he signs and certifies his
21 report, if that's his report.

22 THE COURT: Very simple.

23 Well, you have time to work with him and see if he can
24 sign something and submit it or be used when you meet and
25 confer.

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1 MR. BERMAN: Yes.

2 THE COURT: So I'm going to order that when you
3 meet and confer, that you present a signed inspection plan
4 that can be considered by counsel for the plaintiffs so that
5 you all can use that as a starting point to work out some
6 type of --

7 MR. BERMAN: I'm seeing nods from the gallery.

8 MR. LONG: Can I ask just a matter of
9 clarification? I mean, is this his plan? Can I ask that?
10 Is this Mr. Hartsog's plan?

11 THE COURT: Well, I'm not going to get into
12 that right now. He's going to submit to you a plan that's
13 going to be signed, and it may be that one or it may be
14 something entirely different, but it's going to be signed.

15 MR. BERMAN: Understood. And for clarification --
16 I believe Mr. Long knows this -- the plan that is first
17 submitted to MSHA and the plan that is ultimately agreed
18 upon by MSHA goes through iterations.

19 THE COURT: It goes through what?

20 MR. BERMAN: It goes through changes, just
21 necessarily.

22 THE COURT: What do you mean by that?

23 MR. BERMAN: Meaning, we would submit a proposed
24 plan to the district manager. And the district manager
25 might say , okay, I think I'd like to see additional fans,

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1 for instance, in this location, or certain additional
2 precautions.

3 And you'd say, okay, we'll be back to you in a week and
4 try with a slight revision to the proposal.

5 Then you come back in a week and you say, okay, we
6 proposed to put a plan here and here -- a fan, excuse me.

7 And Mr. Dotson might say, okay, but I've got another
8 question about the safety of the roof in this given spot.

9 So it can go through some -- but that doesn't have to
10 be a protracted process.

11 MR. LONG: What it means, Your Honor, is it going
12 to take him six months or more that --

13 MR. BERMAN: Well, what I mean is it could take up
14 to a month.

15 THE COURT: Well, that's what I'm getting to. You
16 all have to get back to the Court by the 24th that you all
17 have a plan, if it works. You may not be able to get one.
18 But if you all get a plan that you all agree to, then that
19 has to be submitted to MSHA. And then I need to know
20 whether you all agree on the plan that you're going to
21 submit.

22 MR. BERMAN: Yes. I think the way it might work
23 in practice, Judge, is that we would say something like, we
24 need X, Y, and Z information, and we need to know that you
25 will at least take no -- you, Bluestone, at least take no

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1 position. In other words, as I said before, if we are --
2 show a plan. They say, look, go ahead. We don't think it's
3 going to get approved, but go ahead and submit it. Then we
4 need to know, at a minimum --

5 THE COURT: Who will say that? Because you're
6 submitting the plan to MSHA, right?

7 MR. BERMAN: Well, the idea, as I understand what
8 Your Honor is ordering, for us to work together --

9 THE COURT: For you all to work together to get a
10 plan, a joint plan.

11 MR. BERMAN: Right. That's right.

12 THE COURT: And then you submit that joint plan to
13 MSHA --

14 MR. BERMAN: Got it. That's great.

15 THE COURT: -- for approval.

16 MR. BERMAN: It only works, though, if the
17 plaintiffs, if my adversaries are willing to give us some of
18 the additional information we need, and if they are willing
19 to say, okay, we actually don't think it's going to get
20 granted, but we are not going to undermine it -- no pun
21 intended -- by calling up the ADM and saying, hey, don't
22 grant this or by otherwise --

23 THE COURT: I don't think they'd do that, Mr.
24 Berman.

25 MR. BERMAN: All right.

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1 MR. LONG: We reserve the right not to agree to
2 any plan if we don't believe it's safe.

3 THE COURT: Right. That's our plan.

4 MR. LONG: I can predict for you now, it's going
5 to be a massive request for information, in light of all
6 we've produced. But I'm just here to tell you that that's
7 what is going to happen.

8 THE COURT: I want you all to try. And then, like
9 I said, I need to know what happens by the 24th, and then
10 we'll go from there.

11 MR. LONG: And two other points. I've been
12 assured by the senior vice president of safety, a plan -- a
13 generic plan can be submitted on their own to MSHA, asking
14 whether the parameters are appropriate. Okay. They can go
15 that route on their own.

16 And another thing that they're neglecting, this is
17 going to have to go and have input from technical support
18 people in Arlington, Virginia. It's not just going to be
19 calling up Mr. Dotson, saying, this is good. It's going to
20 go to Virginia.

21 THE COURT: Well, just get it together and advise
22 the Court by the 24th.

23 MR. BERMAN: I understand, Your Honor.

24 THE COURT: And then I may see you all again. I
25 hope not, but I may see you all again.

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1 All right?

2 MR. BERMAN: Thank you, Your Honor.

3 THE COURT: Is there anything further?

4 MR. BERMAN: No, sir.

5 MR. LONG: Thank you, Your Honor.

6 THE COURT: If there is nothing further, we are
7 adjourned. Thank you.

8 THE CLERK: All rise. This Court is in recess.

9 (Proceedings concluded at 2:50 p.m.)
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2 I, Catherine Schutte-Stant, Federal Official Realtime
3 Court Reporter, in and for the United States District Court
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13 _____ August 19, 2018

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